

IN THE SENATE OF THE UNITED STATES.

DECEMBER 7, 1858.—Ordered to lie on the table.  
DECEMBER 13, 1858.—Referred to the Committee on Claims.

The COURT OF CLAIMS submitted the following

**REPORT.**

*To the honorable the Senate and House of Representatives of the United States in Congress assembled:*

The Court of Claims respectfully presents the following documents as the report in the case of

ISAAC BOWMAN AND ANOTHER, EXECUTORS OF ISAAC  
BOWMAN, *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Certified copies of documents from the Pension office, filed by claimant.
3. Isaac Bowman's will, with certificate of probate of the same, and certificate of the death of Mrs. Bowman, transmitted to the House of Representatives.
4. Copy of Heath's report in the case of John Crittenden. Copy of instructions to General Clark in same case, and the decision of the Secretary of the Interior, transmitted to the House of Representatives.
5. Decision of the Secretary of the Interior in Isaac Bowman's case.
6. Claimant's brief.
7. United States Solicitor's brief.
8. Opinion of the Court adverse to the claim.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed  
[L. s.] the seal of said Court, at Washington, this seventh day  
December, A. D. 1858.

SAM'L H. HUNTINGTON,  
*Chief Clerk Court of Claims.*

IN THE UNITED STATES COURT OF CLAIMS.

*To the Judges of the Court of Claims, established by the act of the Congress of the United States of America approved February 24, 1855:*

Your petitioners, Isaac S. Bowman and George Brinker, surviving executors of the last will and testament of the deceased Isaac Bow

man, citizens of the State of Virginia, and therein residing, do most respectfully state and allege to this honorable Court:

That the said testator, Isaac Bowman, a citizen of the State of Virginia, in the war of the revolution held the commission of the State of Virginia, in the regiment of Colonel George Rogers Clark, (afterwards Brigadier General Clark,) called the Illinois regiment, and also held the staff appointment in said regiment of quartermaster, also called in the vulgar tongue horse-master, because among his duties of quartermaster he had to purchase horses for the regiment, sell such as were broken down and unfit for or not longer needed for service, and to superintend that branch of the service.

That whilst in service and in the line of his duty, commanding a detachment of said regiment, they, the said troops, were attacked by the Chickasaw Indians, the allies of Great Britain, then at war with the United States, whereupon a bloody battle ensued, in which said Isaac Bowman was wounded and disabled by four wounds in his body and limbs, by leaden balls discharged from the guns of the Indians, and taken prisoner; all his soldiers except one, named Riddle, were killed, and said Isaac Bowman was detained as a prisoner from November, 1779, to April, 1780; he was sold by his captors to a white man trading among the Indians, named Trumbull, by him taken to New Orleans, and from thence to the Island of Cuba, from whence said Isaac Bowman passed to the city of Philadelphia, and thence to his home in Virginia.

Your petitioners aver that said Isaac Bowman never resigned his commission as lieutenant, nor his appointment as quartermaster, otherwise called horse-master; that he was never again ordered into service after his return from captivity; that he never was cashiered or dismissed from the service by the sentence of any court martial. That, by reason of the said facts and services of said Isaac Bowman, he became entitled, under the statute of Virginia, (10 Henning, p. 25,) to half-pay for life as a lieutenant and quartermaster, otherwise called horse-master.

The law of Virginia adopted for the pay of her State troops the regulations and pay adopted by the Congress for the continental army.—(See 9 Henning's Stat. at Large, pp. 194, 389, and the Journals of Congress of 27th May. 1778; 2 vols. by Way & Gideon, p. 567.) The pay of a lieutenant of infantry was fixed at twenty-six and two-thirds dollars per month; and by the resolve of Congress, (same page, 567, vol. 2,) the pay of a quartermaster was fixed at thirteen dollars per month (\$13) in addition to his pay in the line; but it appears that the commissioners of the State of Virginia for adjusting the accounts for full pay allowed said Bowman, as horse-master or quartermaster, at the rate of six shillings and four per day, (six shillings to the dollar being the currency of Virginia.) The pay as lieutenant at the rate of twenty-six dollars and two-thirds per month, and as horse-master or quartermaster at the rate of thirteen dollars per month, in addition to his pay in the line, made said Bowman's pay at the rate of thirty-nine and two-thirds dollars per month; the one-half of which (equal to nineteen dollars  $\frac{83}{100}$  and a fraction) the said Bowman became

entitled to per month, from 22d April, 1783, when the war ended, (in Virginia,) until his death in the month of            in the year 1826. And by the act of Congress approved July 5, 1832, to provide for liquidating and paying certain claims of the State of Virginia, and especially by virtue of the third section of said act, (4 Stat. at Large, by Little and B., p. 563, ch. 173,) the United States assumed to pay those claims for half-pay of the officers of the regiments and corps enumerated in said act, which had not been paid or prosecuted to judgments against the State of Virginia, "and for which said State would be bound on the principles of the half-pay cases already decided in the Supreme Court of Appeals of said State."

Your petitioner further states, that under said act of Congress, he, as the executor of his father, did ask payment of the half-pay due for his testator's services as lieutenant and quartermaster, otherwise called horse-master, in the regiment of Colonel Clark, employed in the Illinois service as aforesaid, and produced to the Commissioner of Pensions, James E. Heath, to whom the administration of the said act of 5th July, 1832, had been committed, evidence of the services of said Isaac Bowman, deceased, as before stated; but the said Heath rejected the claim. Upon appeal to the Secretary of the Interior, (Hon. R. McClelland,) the rejection of the claim was approved.

After this, your petitioner, by his agent, presented his petition to the Senate and House of Representatives of the Congress of the United States, which petition was referred in the Senate to the Committee on Pensions, who on 13th February, 1854, made their report in favor of the claim No. 101, and in the House to the Committee on Revolutionary claims, who on the 16th February, 1854, made their report, No. 106, in favor of the claim, by Mr. Rogers; and upon a recommitment to the same committee, a second report in favor of said claim was made on the 30th June, 1854, No. 275, by Mr. Eddy; which reports, respectively, were concurred in by the respective Houses, and by the separate resolves of the Senate and of the House of Representatives the said claim for half-pay, under the act of the general assembly of Virginia, of May session, 1779, was referred to the Secretary of the Interior for liquidation, under the act of Congress of July 5, 1832. All which will more fully appear by said reports, No. 106, No. 275, and No. 101, and the resolutions of said two Houses respectively, as printed in the journals and public documents of the said two Houses of Congress, to which your petitioner begs leave to refer; and he avers that the said reports contain a true history of the services, wounds, captivity, and sufferings of the said Isaac Bowman, deceased.

Certified copies of these reports and resolutions were produced to the Secretary of the Interior. Whereupon the said Secretary, instead of liquidating the said claim and causing the same to be paid, referred to the Attorney General of the United States the question, whether the said two separate reports and resolves made thereupon by the Senate and by the House of Representatives, respectively, were legally obligatory upon him, the said Secretary. Whereupon the Attorney General advised that nothing but a bill, or a joint resolution passed by the two Houses of Congress, and approved by the Presi-

dent of the United States, or, if disapproved by him, reconsidered and passed by two-thirds of each House, his objections notwithstanding, could make an obligatory rule of action; but that the said resolves of the two Houses, although separately made and never presented to the President of the United States for his signature, were entitled to great respect, and gave sufficient cause for opening the decision and giving the claim a reconsideration. But the Secretary of the Interior has, nevertheless, persisted in his refusal to liquidate the claim and to cause payment thereof at the Treasury of the United States, although the evidence produced to him from the records of the State of Virginia, as well as by the proof of witnesses, was ample and conclusive to establish the right and justice of said claim for half-pay, according to the laws of the State of Virginia, and the act of Congress of July 5, 1832, before mentioned. In verification whereof, your petitioner begs leave to refer to said evidence produced to the Secretary of the Interior, certified from that department to the Congress of the United States, and also to the evidence on which the Congress acted as aforesaid, and now remaining as well on the files of the Department of the Interior as on the files of the Clerk of the House of Representatives.

Your petitioner will, in due time, bring here into court his letters testamentary, which show plainly that he is executor of the last will and testament of said Isaac Bowman, deceased, who died on the 9th day of September, 1826.

Your petitioner prays that the solicitor for the United States appointed to represent the government before this honorable Court be required to answer to this petition; that such proceedings be had herein as justice and equity require; and that, on the final hearing, this Court will grant him such relief as his case deserves.

W. AMBROSE WHARTON, and  
GEO. M. BIBB, *For Petitioner.*

DISTRICT OF COLUMBIA, CITY OF WASHINGTON, *scd.*

AUGUST 9, 1855.

On this day, before me, the undersigned, one of the justices of the peace of the United States of America, in and for the said city, duly commissioned, sworn, and acting as such, appeared William A. Wharton, who then and there made oath that the statements in the foregoing petition of Isaac S. Bowman *vs.* the United States, which relate to the matters of fact therein alleged, are true, to the best of his knowledge and belief.

Sworn to before me, on the day and year, and at the place stated in the caption.

JOHN S. HOLLINGSHEAD,  
*Justice of the Peace.*



## UNITED STATES COURT OF CLAIMS.

*Amendment to Petition.*

ISAAC S. BOWMAN and GEORGE BRINKER, surviving executors of ISAAC BOWMAN, deceased, *vs.* THE UNITED STATES.

The petitioners moved to amend their petition in this : Instead of the prayer for the specific aggregated sum stated in the petition, the petitioners pray for the half-pay due to said Isaac Bowman, deceased, as lieutenant and quartermaster, otherwise called horse-master, in Clark's regiment, with interest on each annuity from the day it became due until paid; or for such other sum or sums as this Court shall adjudge right and proper.

BIBB, *For Petitioners.*

---

 IN THE UNITED STATES COURT OF CLAIMS.

ISAAC S. BOWMAN and GEORGE BRINKER, surviving executors of Isaac Bowman, petitioners, *vs.* THE UNITED STATES, defendant.

This claim is for half-pay due the testator, Isaac Bowman, in his lifetime, for his services as lieutenant in the line, and quartermaster (otherwise called horse-master) in the staff, in Colonel George Rogers Clarke's regiment, called the Illinois regiment, under the act of Virginia of May session, 1779, (10 Henning's Statutes, p. 25,) by which "All general officers of the army, \* \* \* all field officers, captains, and subalterns, commanding, or who shall command in the battalions of this commonwealth on continental establishment, or serving in the battalions raised for the immediate defence of the State, or for the defence of the United States, and all chaplains, physicians, surgeons," &c., &c., \* \* \* "provided Congress do not make some tantamount provision for them, who shall serve henceforward, or from the time of their being commissioned until the end of the war; and all such officers who have or shall become supernumerary on reduction of any of the said battalions, and shall again enter into the said service, *if required so to do*, in the same or any higher rank, and continue therein until the end of the war, shall be entitled to half-pay during life, to commence from the determination of their *command or service.*"

Congress did make provision for half-pay for life for the officers of the continental army, by resolution of May 15, 1780, (Journals of Congress, by Way & Gideon, vol. 2, p. 554,) amended by resolve of August 11, 1779, (vol. 3, pp. 536, 537,) extended to the widows and orphans of those officers "who have died or shall hereafter die in the service;" by resolve of August 21, 1780, (same vol., pp. 512, 513,) amended by resolve of August 24, 1780, so as to include officers reduced, (same vol. pp. 538, 539;) finally commuted for five years' full pay, with interest at six per centum per annum, by consent of

the officers, the mode of taking such consent being provided for by the resolve of March 22, 1783.—(1 vol. of Journals, by Way & Gideon, pp. 178, 179.)

This provision by Congress, confined to the officers on continental establishment, left the State of Virginia to pay the officers of the army for her own internal security and defence, according to the promises made by the aforementioned act of May, 1779, (10 Henn., p. 25,) extended to the officers of the navy.—(Nov. sess., 1781; 10 Henn., p. 467, chap. 19, sec. 14.) By the act of Congress approved July 5, 1832, (4 Stat. at Large, by L. & B., p. 563, chap. 173,) the United States assumed the payment of the debts so contracted by the State of Virginia.

The merits of this claim are fully set forth in the report of the Committee of the Senate on Pensions, of February 13, 1854, No. 101, concurred in by the Senate, and in the two reports of the House of Representatives on revolutionary claims, of February 16, 1854, No. 106, and on June 30, 1854, No. 275, concurred in by a resolution of the House, copies of which are filed.

The proof exhibited by the executive department, and by that communicated to Congress, is so clear and satisfactory as to the merits of this claim that it was, no doubt, matter of surprise to the Congress that the executive department should have rejected the claim wholly and totally, and so, I doubt not, it will be to this court, upon reading the evidence certified from the executive department to Congress, an authentic copy whereof is filed, (exhibit A,) and especially that the executive department should have persisted in the total negation of the claim after the resolutions of the respective houses of Congress.

For proof of Isaac Bowman's services as lieutenant and as quartermaster, (otherwise called horse master,) I refer to exhibit A, pp. 3, 6 to 9, 18, 19, 20, 28, and 29.

The legislature of Virginia, by resolution of 2d January, 1781, (10 Henn., p. 565,) and act of October session, 1783, (11 Henn., p. 327,) granted to the officers and soldiers of Clarke's regiment (called the Illinois regiment) a tract of land of 150,000 acres to be divided among them.

By act of Virginia of October session, 1783, (11 Henn. 335, chap. 21,) commissioners were appointed to divide this land among the officers and soldiers of Clarke's regiment, and to assign to those entitled their respective purparts in severalty.

That board, consisting of ten persons, whereof six were officers of Colonel George Rogers Clarke's regiment, and said Clarke himself, as president of the board, awarded to Isaac Bowman, as lieutenant, 2,156 acres of land.—(Exhibit A, pp. 8, 9.)

The official report of John Todd, county lieutenant, to the governor of Virginia, gives (A, pp. 28, 29) a detailed statement of the capture of Isaac Bowman by the Chickasaw Indians in November 1799, when he was ascending the Ohio river in charge of boats, stores, and families, destined for Louisville, under the order of Colonel George Rogers Clarke.

Isaac Bowman died 9th September, 1826.—(Exhibit A, p. 26, Yost and Kercheval, and other proof filed.)

The governor of Virginia, upon receiving the proclamation of Congress of 11th April, 1783, "declaring the cessation of arms, as well by sea as by land, agreed upon between the United States of America and his Britannic majesty, and enjoining the observance thereof," (4 Journals of Congress, by Way & Gideon, p. 186,) on the 21st April, 1783, issued his proclamation, and ordered that the troops of Virginia on the State establishment for the internal security and defence of the State be discharged.—(11 Henn., pp. 551, 552.) Wherefore, the 22d April, 1783, has been uniformly taken as the end of the war in Virginia, in relation to the claims of the officers of the State establishment for service to the end of the revolutionary war, and so it is said in Marston's case, 9 Leigh's Va. Rep., p. 38.

That Isaac Bowman was in service, as a lieutenant in George Rogers Clarke's regiment, in November, 1779; that he was then captured in service, in the line of his duty, in obeying the orders of Colonel Clarke, and carried into captivity, is satisfactorily proved. The report of John Todd (county lieutenant) to the governor of Virginia, and the award of the board of commissioners to said Bowman, as lieutenant, for his purpart of the 150,000 acres of land granted to Clarke's regiment, (Exhibit A, p. 6 to 9, and pp. 28, 29,) leave no loop whereon to hang a doubt. And in the same document we find that said Bowman was paid by the State of Virginia the arrearage of his monthly pay as quartermaster (otherwise called horse master) up to the time of his captivity; and it appears therein that the officers appointed to audit and adjust the accounts of the Illinois regiment thought that Bowman's captivity in November, 1779, had deprived him of pay beyond that period.

With the question of arrearages of whole pay per month, due to Bowman before the conclusion of the war, we have nothing to do. His half-pay for life, after his discharge from the service, under the proclamation of the governor of Virginia for disbanding all the State troops, is the subject of inquiry now before the court.

*Captivity no cause for withholding the promised half-pay for life.*

I need not labor to show that Lieutenant Bowman, by being taken prisoner of war and held in captivity, did not thereby forfeit the protection of his government; that he was, nevertheless, to be cared for, exchanged or ransomed. If so, it might be that he did not thereby forfeit his commission as an officer, nor his half-pay for life after the conclusion of the war.

In Markam's case, decided in the supreme court of appeals of Virginia, in April, 1830, (1 Leigh, 516, to 523,) it appeared that James Markam was a captain in the navy of the State of Virginia, commanding the vessel-of-war "The Tempest," when, in April, 1781, "The Tempest" was captured by the British forces. Markam and others were taken prisoners of war. Captain Markam was parolled on the 20th April, 1781, and continued an unexchanged prisoner of war until the return of peace; nevertheless, he was adjudged entitled to half-pay during his life, under the act of Virginia of

October session, 1779, and November session, 1781.—(10 Henn., 25 and 467.) In that case Judge Green cited the previous decision in the case of Churchill Gibbs, who was taken a prisoner of war in May, 1781, and continued a prisoner until the end of the war, and was nevertheless adjudged entitled to his half-pay for life.

*Resignation or sentence of dismissal not to be presumed.*

If, after his captivity, Isaac Bowman resigned, such resignation must have been tendered in writing and assented to by the government, as provided by the ordinance of December, 1775.—(9 Henning, pp. 95, 96, chapter 4.)

That a military officer has not the right to resign his commission, otherwise than with the consent of his government, is a universal principle of military law, existing before and ever since the express declaration to that effect in the ordinance above quoted. If military officers had the right of their own mere will and pleasure, and without the consent of their government to resign and quit the service, then an important military enterprise, or the military strength, order, and discipline, on the eve of an expected battle, might be paralyzed by such voluntary and unaccepted resignations of officers.

The affirmative, that an officer had resigned his commission, must be proved by the affirmant; it is not to be presumed.—(Marston's case, 9 Leigh, p. 42.)

So, likewise, it is not to be presumed that Bowman was cashiered, dismissed from service by sentence of a court martial, nor that he was guilty of disobedience of any order whatever, particularly to that of being ordered to join his regiment and refusing so to do, thereby to forfeit his claim to half-pay for life after the conclusion of the war.

The burden of proof of all and every of such affirmatives would be on the party affirming. Negatives, in general, are incapable of being proved; are not required to be proved; the maxim is, "*De non apparentibus et non existentibus eadem est lex.*"—Coke, 2 Institute, 20, (6.)

*Supernumerary officer entitled to half-pay during his life.*

If Lieutenant Bowman became a supernumerary officer by the reduction of Colonel Clarke's regiment, (which, however, does not appear,) yet that would not have debarred him of his half-pay during his life, he having been in actual service as lieutenant and quartermaster in November, 1799, when taken prisoner of war. So it was adjudged in Lilly's case, April, 1830, (1 Leigh's Rep., 525,) and Markam's case, (9 Leigh, 36.)

*Of Commutation of half-pay*

The Congress of the confederation, by resolve of March 22, 1783, proposed to the officers on continental establishment to commute their half-pay for life, promised by former resolves, for five years' full pay, in compensation of the half-pay for life.

It will be seen by that resolution of Congress that those entitled to

the half-pay so proposed to be commuted were permitted to accept or refuse this commutation, in the manner and time mentioned in the resolve. The Congress treated the claims of these officers to half-pay as contracts not to be modified by the one party without the assent of the other. The continental regiments accepted the modification of five years' full pay, with interest until paid, in commutation and compensation for half-pay for life; so certificates were issued to continental officers, as well to those who were in actual service to the end of the war as those who had, by reduction and derangements of regiments, been thrown out of command and actual service as supernumeraries, but liable to be again called into actual service if necessity had required. These certificates were for five years' full pay, bearing interest at the rate of six per centum per annum until paid.

The State of Virginia had not, during the war, promised nor proposed to the officers on the State establishment for internal security and defence, five years' full pay in commutation of the half-pay for life, engaged by the act of 1779. But on the 16th of December, 1790, the legislature of Virginia enacted, (Session Acts of that year, p. 12, chap. 21—Henning's Statutes, vol. , p. ,) "that the same compensation of half-pay should be extended to those officers of the State line who continued in *actual* service to the end of the war, as was allowed to the officers of the continental line, and also to those who became supernumerary, and being afterwards required, did again enter into *actual* service and continue therein to the end of the war."

This act of 1790 the courts of Virginia construed as allowing five years' full pay and interest in lieu of half-pay for life, to such claimants as should ask for the commutation and were in *actual* service at the end of the war.

It is evident that this act of 1790 (passed after the end of the war) could not be compulsive upon the officers of the State line (nor upon their representatives) who had become entitled to half-pay during life, under the act of 1779. It could not, without the consent of those entitled to half-pay for life, reform, alter, and impair the obligations of the contracts between the State and its officers who had served the State under the terms held out in the act of 1779.

No mode of election to accept or to refuse the provision of this act of December 16, 1790, was pointed out in the act itself; therefore the claimant, after the act of 1790, was at liberty to ask the gratuity allowed of five years' full pay and interest, or to insist upon the contract for half-pay during his life. This act of 1790 was passed seven years after the return of the peace, and after the several States, by their respective conventions, had ratified and put into operation the Constitution of the United States, whereby it is ordained that "no State shall \* \* \* pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." The legislature of Virginia, by this act of 1790, intended to give to the officers within its purview a benefit; not to take away anything which had been promised by the act of 1779. It does not intend nor wear the semblance of an attempt to impair the obligations of the contracts of the State



with her officers for half-pay during life, which accrued under the act of 1779; a matter prohibited by the Constitution of the United States. The effect of that law of 1790 is to add, not to subtract.

The executors of Isaac Bowman insist upon half-pay during his life, (without interest,) because it is more beneficial than five years' full pay, with interest at the rate of six per cent. per year, from the end of the war until paid.

*Of conditions.*

The inducement of half-pay for life, held out by the act of 1799, accepted by the officers who continued in service until the end of the war, or became supernumerary, and were no longer required by the State to exercise their commands "in the same or any higher rank," became contracts—terms proposed by the one party and accepted by the other. This is the view taken by Judge Coulter, in his opinion delivered in Lilly's case, 1 Leigh's Reports, 525, before cited. The State employed the officers for its military service during the war. The officers who were in the performance of their part of the contract left their homes and private affairs; risked their health and lives in the military service of their country; fought with halts about their necks, to be hung as traitors, and their estates confiscated and escheated, if Great Britain prevailed over the rebels.

These were valuable considerations. Since the success of the revolution, and our independence of the crown of Great Britain, those officers claim the promised remuneration for such privations, hardships, and risks, to be maintained during their respective lives upon half pay, promised by the act of 1779.

According to the well-settled principles respecting the obligations of contracts and conditions, if the officers who were in the performance of their parts were prevented by the State from further performance, by not providing privates to be commanded; by reducing the military establishment, and creating supernumerary officers; or by discharging the officer from service before the end of the war, for any cause whatever, other than for the crime, misbehavior, or default of the officer himself, the State was bound to the officer equally as if he had been in actual service to the end of the war.

In Coke Litt. 206 b, that profound lawyer tells us, "If a man make a feoffment in fee upon condition that the feoffor shall re-enfeoff him before such a day, and before the day the feoffor disseise the feoffee, and hold him out by force until the day be passed, the estate of the feoffee is absolute, for the feoffor is the cause wherefore the condition cannot be performed, and therefore shall never take advantage for the non-performance thereof. So if A be bound to B, that J S shall marry Jane G before such a day, and before the day B doth marry with Jane, he shall never take advantage of the bond, for that he himself is the mean that the condition could not be performed. And this is regularly true in all cases."

"It is a rule common to all the conditions of obligations, that they ought to be holden to be performed when the debtor who has obliged himself under the condition has prevented its performance."—(Pothier

on Obligations, part 2, chap. 3, art. 3, sec. 212, in Newburn edition of 1802, p. 127.)

To these authorities I add—

Domat's Civil Law, book I, title 1, §§ 4, 17—Paris edition of 1777, page 29 ; English edition, page 186, § 220.

Robinett *vs.* Ship Exeter, 2 Rob. Admiralty Report, 261.

Simmonds *vs.* Roberts, 3 Esp. Report, 71.

Beeston *vs.* Collyer, 4 Bing. 309.

French *vs.* Brooks, 6 Bing. 354.

Fawcett *vs.* Cash, 5 Barn. and Ad., 904.

Williams *vs.* Byrne, 7 Ad. and Ellis, 177.

Gandell *vs.* Pontignay, 4 Camp. 375.

Alder *vs.* Keighly, 15 Meeson and Welsby, 117, 130—in the Exchequer.

Touchstone, Obligation, p. 392.

Powell on Contracts, pp. 417, 418, 419, 420.

Abbot on Shipping, part 4, chap. 2, page 443.

Puller *vs.* Stanforth, 11 East, 232.

Kean *vs.* Ship Gloucester, in Federal court appeals, 1782, 2 Dallas, 38.

Ex parte Giddings, 2 Gallison Rep. 56.

Mahoon *vs.* The Gloucester, 2 Peters's Ad. Rep. 403.

Emmerson *vs.* Howland, 1 Mason, 51, 52.

Hoyt *vs.* Wildfire, 3 John. 518.

Johnston *vs.* Dalton, 1 Cowen, 543.

Brooks *vs.* Dorr, 2 Massachusetts Rep. 39, 42, 47, 48, 49.

Luscomb *vs.* Prince, 12 Massachusetts Rep. 576.

Costigan *vs.* M. and H. Railroad Company, 2 Denio, 609.

Marshall *vs.* Craig, at Common Law, 1 Bibb, 386.

Marshall *vs.* Craig, in Chancery, 1 Bibb, 394.

The law relating to conditions in contracts, so long established, so prevailing in Europe and America, in the courts of admiralty adjudging according to the law of nations, in courts of common law, in courts of equity, and in the civil law, is a rule of reason, a rule of natural justice and moral equity essential to the preservation of good faith in the performance of contracts. Princes, whether they be monarchies, oligarchies, republics or democracies, are morally bound to fulfil their engagements. They have no privilege to be faithless; no prerogative to deal deceitfully with their subjects or citizens.

Hence it follows that the promise of half-pay for life to the officers who should enter into the service "and continue therein until the end of the war," is coupled with the implied condition, inevitably and necessarily understood, "unless sooner discharged by the will of the government."

*The period of time at which the half-pay is to commence.*

The rule of justice and equity in respect of conditions in obligations, "that they ought to be holden to be performed when the debtor who has obliged under the condition, has prevented its performance," connected with the proclamation of the governor of Virginia for discharging the troops on State establishment makes it useless, wholly

unnecessary in this case to pursue and decide technically and critically the precise period of time at which the revolutionary war between the United States and Great Britain was at an end in the State of Virginia; whether on the day when the governor of Virginia, having received intelligence of the provisional articles of a treaty for a cessation of hostilities by sea and land, issued his proclamation for the discharge of the State troops, or at the several and respective days on which the several battalions, corps and companies received notice of the governor's proclamation, or at the time when the Congress of the United States issued their proclamation of the definitive treaty of peace and the discharge of the continental troops; or when the continental regiments or corps received intelligence of that proclamation announcing the definitive treaty of peace, and commanding them to conduct themselves accordingly.

There is a difference between a theoretical end of a war by a treaty of peace signed and a practical, actual end of war. The hostile forces of the invaders may be expelled or captured, and so the war may cease; or after a treaty of peace the war may continue in fact in the distant places on sea and land until notice of the treaty shall be given to belligerent forces there. The ninth of the provisional articles of peace between the United States of America and his Britannic majesty, signed at Paris, November 30, 1782, illustrates the distinction. The treaty of peace between the United States and Great Britain was signed at Ghent on the 24th December, 1814, and on the 8th January, 1815, the great battle at New Orleans was fought between the forces of the United States and those of Great Britain; neither of the generals commanding the hostile armies there arrayed having notice that such a treaty had been signed. As the theoretical and the practical end of the war may be of different times, the one or the other may be applied to different cases, according to their circumstances and subject matter.

The Congress had the authority to discharge the troops furnished for the general defence by the respective States, according to their respective quotas, under the articles of confederation, but had no authority whatever either to discharge or to keep in service the troops raised by the State of Virginia for her own internal security and defence. Virginia alone had the authority to retain or discharge those troops; and had an unquestionable right to discharge them in part or in whole, whenever she pleased so to do. Nevertheless the State, by discharging those, her military forces, before the Congress had proclaimed the end of the war and the discharge of the troops in the continental service, could not thereby impair the obligations of the State for half pay for life to her officers on the State establishment for internal security and defence of the State, which had accrued under the said act of 1779.

The proclamation of the governor of Virginia, of April, 1783, announcing the provisional articles of peace, (as made known by the Congress,) and for the discharge of the troops on the State establishment, has been uniformly taken as the time from which the half-pay of the officers of the State line of Virginia should be computed as for

service until the end of the war. So it is stated in Marston's case, (9 Leigh, p. 38.) Such has been the practice in the administration of the third section of the act of Congress, approved July 5, 1832; but supernumerary officers are entitled "to half-pay during life, to commence from the determination of their *command*."

The act of Congress of July 5, 1832, whereby the United States assumed to pay these debts of half-pay due by the State of Virginia to her officers on State establishment, particularly mentions "the regiments of Colonels *Clarke* and *Crockett*, and Captain *Rogers'* troop of cavalry, who were employed in the Illinois service," and directs an adjustment and settlement "of those claims for half-pay of the officers of the aforesaid regiments and corps, for which the State of Virginia would be bound on the principles of the half-pay cases already decided in the supreme court of appeals of said State."

Before this act the two cases had been decided in the supreme court of appeals of the State of Virginia; *Markam's* case, in 1830, (1 Leigh, 516,) and *Lilly's* case, (1 Leigh, 525;) the principles whereof are conclusive in favor of Lieutenant *Bowman's* right to half-pay.

*Rate of pay and amount of half-pay.*

The State of Virginia, by the acts of October session, 1776, and May session, 1778, (9 Henning, 194, chap. 23, and 452, chap. 3,) enacted that the officers and soldiers raised for the internal security and defence of the State "shall be entitled to the same pay and rations, be subject to the same laws, articles, and regulations, as are established by the general Congress for the pay and government of the continental troops." And again, by act of October session, 1780, (10 Henning, p. 389, chap. 32,) it was enacted, as to the regiment under Colonel *George Rogers Clarke's* command, that it be recruited and fully completed for the defence of the western frontier against the invasions of the British and Indians, and that the officers and privates of said regiment "be allowed the same pay and rations with other officers and privates on continental establishment."

The Congress, by resolve of 27th May, 1778, (Journals by *Way & Gideon*, vol 2, p. 567,) fixed the establishment of the American army, and the pay of a lieutenant of infantry at twenty-six two-thirds dollars per month; of a quartermaster, to be taken from the line, at thirteen dollars per month, in addition to his pay as an officer in the line.

The uniform construction and practice has been that an officer in the line, who held also an office in the staff or field, is entitled to half the pay, during life, attached to both the offices. So *Isaac Bowman's half-pay* (for both offices) was at the rate of nineteen dollars eighty-three and one-third cents (\$19 83) per month, or two hundred and thirty-eight dollars per year, to which he was entitled from the governor's proclamation, April 22, 1783, to his death, on 9th September, 1826, forty-three years, four months, and seventeen days, making the sum of \$9,324 80, for which a decree is prayed most respectfully.

GEO. M. BIBB,

*For petitioners.*

IN THE COURT OF CLAIMS.—No. 177.

EXECUTORS OF ISAAC BOWMAN *vs.* THE UNITED STATES.*Brief of United States Solicitor.*

This is a claim for half-pay for life, under the Virginia resolution of May, 1775, the obligations of which the United States have assumed by the act of July 5, 1832.

To entitle the claimant to the benefits of the resolution of May, 1779, and consequently to sustain this claim under the act of July 5, 1832, the petitioner must show—

1st. That his testator was a general officer, field officer, captain, or subaltern, in one of the regiments described in the resolution; and the averment is that he was a lieutenant in Clarke's Illinois regiment.

2d. That he served to the end of the war, or became supernumerary by the reduction of the regiment; and the averment is understood to be that he served to the end of the war.

The questions are questions of fact, and the record evidence may be considered under three heads: 1. Contemporaneous documents, being of the date when he was in service; 2. Those relating to the allowance of his claim for pay; 3. Those connected with the allowance of his claim for land. There is also some parol testimony, taken in 1834, not admissible under the rules of this court, but no objection is made to its receiving such consideration as it may appear entitled to in deciding a nice question of fact more than fifty-four years old.

I. Was Isaac Bowman a commissioned officer? The evidence establishes that Isaac Bowman was appointed "horse master" in Clarke's regiment in May, 1779, and served until he was captured by Indians, November 17, 1779. It is contended by the petitioner that a horse master was a quartermaster, and that a quartermaster was a lieutenant. On the part of the United States it is denied that a horse master was equivalent to quartermaster, and no evidence is adduced on the part of the petition to prove it.

*Contemporaneous documents.*

These consist of receipts taken by Bowman for public moneys disbursed by him; of accounts of public stores kept by him; and accounts of public stores in which he is charged; and of an official letter reporting the defeat of his party, and his supposed death. In none of these is any military title given him. He is invariably called plain Mr. Bowman, or Mr. Bowman, horse master, with a single exception. In one of the entries thirty-eight horses are charged to "Captain Bowman, horse master." Now it is not alleged that he was a captain, for then he could not have been quartermaster. It was a random title by which he seems to have been called by his friends, and its use in the document cited proves that he was not a lieutenant by commission. All the contemporaneous documents are of a character in which the official designation of every officer should have been,



and no doubt was given, and in all these Mr. Isaac Bowman, horse-master, stands in juxtaposition with lieutenants, captains, and majors, who receive their full military titles. See, for instance, the three leaves from the ledger: on one stands "Dr. *Mr. Isaac Bowman, Cr.*;" on the next, "Dr. *Captain Edward Worthington, Cr.*;" and on the next, "Dr. *Major Joseph Bowman, Cr.*" I understand these to be the accounts of John Reed, as they are preceded by a certificate proving that he was quartermaster of the regiment during the period of the entries, but a note on the first page goes to show that they may have been Bowman's accounts. This does not help the petitioner's case. Any one, and particularly any employé, having charge of quartermaster's stores, might have quartermaster accounts. But if these were Bowman's accounts, then as he, in both places where his name occurs, gave himself no military title, while he gives it to others, it proves he had no military rank.

*Evidence produced to obtain pay in 1783.*

In this year sat a commission in Richmond, under act of June 21, 1781,\* to settle claims growing out of the Illinois expedition.

Bowman stated his account and presented it to this commission. In it he makes no military title, and charges for his "services as horse master"—nothing else. He names no sum, but leaves that to be determined by the commission. The omission of any designation of military rank, and the omission to name the rate of pay, are pregnant with meaning. If he had been a commissioned officer his pay would have been determined by his rank, and he could not have failed to state both.

In support of this claim he produced the certificate of Colonel Clarke, the commander of the regiment: He certified that Mr. Bowman was appointed horse master, &c., giving him no military rank.

Then follows his own affidavit that he was horse master.

The board awarded him pay for services as horse master; allowed him six shillings and four pence per day—"equal to the pay of a quartermaster"—not that he was a quartermaster—this is impliedly denied—but he deserved as much.

The board computed pay only up to the day of his capture by the Indians; he charged pay for the time he was in captivity, and if he had been an officer it would have been allowed. Officers were universally paid while in captivity.

The board found that he was out of service by his capture. Such an allegation respecting an officer would have been incorrect.

All that has thus far appeared, down to 1783, not only fails to sustain, but contradicts the allegation that Bowman was a commissioned officer.

---

\* See section 5 act of May, 1782, (11 Hum. St., 83,) as to settlements by officers with the Auditor.

*Grant of bounty land in 1784.*

By an act of Virginia, in 1781, providing for the cession of the Northwestern Territory, 150,000 acres were reserved for Clarke's regiment. (10 Henning's Statutes, p. 565.) By an act passed at October session, 1783, (11 Henning's Statutes, p. 335,) a board was constituted to apportion these lands. On the 4th of October, 1784, they made a list of claims allowed and disallowed, in this form:

John Williams, captain ;  
George R. Clarke, brigadier general ;  
George Walls, not allowed ;  
John Jones, soldier ;  
Isaac Bowman, lieutenant.

It is contended for the petitioner, that the entry of lieutenant opposite Bowman's name, proves that Bowman was lieutenant. As General Clarke and other officers of the regiment sat upon that board, it is admitted that if the entry above cited means that Bowman was lieutenant, it is very strong evidence in favor of the petitioner. But, nevertheless, it is to be considered that the main business of the board was to distribute the lands, not to determine the rank of officers, and they might perhaps consider some one who had done good service and was fairly entitled to an officer's share, to be such for this purpose, though he was not actually commissioned. And it is in this way, I think, that Bowman's name appears as lieutenant on the list.

By the act above cited of 1783, the board was directed to be governed by the allowance made to continental officers ; and this allowance was apportioned exclusively according to line rank.—(See 10 Hen. Stat., p. 160.) It is therefore suggested, that the rank set opposite each man's name was so set, not as declaring that he held such rank, but as the measure of the allowance made to him. This is corroborated by the heading of the list, which is of claims allowed or disallowed, not of officers entitled, &c. The title follows each name instead of preceding it, and where no allowance is made, no title is given ; opposite the name stands the words "not allowed." If the omission of military title and the use of these words are not intended, and they certainly are not, to deny a military character to the person so marked, then the insertion of "Lt," &c., should not be construed to attribute a military character to the person so designated. Both are intended to refer solely to land, the one declaring that the person shall have none ; the other that he shall have a certain quantity. But see next page as to issue of warrants to the officers.

As the commissioners, in adjusting Bowman's claim for pay, gave him quartermaster's pay, though, in effect, declaring that he was not a quartermaster, so this board gave him a lieutenant's share of land, though he was not a lieutenant ; and, as a quartermaster was in rank a lieutenant, the board, who gave him lands, was very probably governed by the decision of the commissioners who fixed his pay.

The State of Virginia has been exceedingly liberal in granting

lands, and it is not shown how far the fact of having received bounty land has been received as evidence to prove actual commission and service.

II. If Bowman was a commissioned officer, did he fulfil the conditions of the act?

1st. Did he serve to the end of the war? The petitioner produces evidence to prove he was an officer, and then throws on the United States the onus of proving that he ceased to hold his commission. He assumes that Bowman served so long as he continued to hold his commission or office. It is, however, shown by the testimony that Bowman returned to Virginia about the 11th of October, 1780, (see his claim for pay,) retired to his home, and never joined the army again. That was not serving—it was absence without leave. It was his duty instantly, on his return, to rejoin his regiment, and, if too ill to continue with it, to show that fact and retire on sick leave. Some evidence is produced to show that he was unable to do duty. If he could make his way from New Orleans home, the presumption is that he could have reached his regiment, or, at least, he might have reported by letter. Officers are not permitted to judge for themselves as to their capacity for service. Superior authority sometimes compels them to choose between a return to duty and resignation. Bowman could not properly and fairly avoid investigation into his condition by remaining quietly at home during the remaining two years and a half of the war, when an arduous struggle was taking place on the soil of his own State.

2d. Did he become supernumerary? This is not alleged or shown. It is impliedly denied.

From a view of all the evidence, it seems probable that Bowman was an enlisted man in 1777; that in May, 1779, he was appointed a horse master under the regimental quartermaster, and aided in the duties of that department; that his duties were considered as important as those of a quartermaster having the rank of a lieutenant; that he was therefore allowed equal pay, and equal land, but that he was never commissioned, and never served as required by the resolution of May, 1779.

Should the service, however, be admitted, the claim cannot exceed the line pay of a lieutenant, exclusive of additional allowance for staff duty; and interest cannot be allowed. The act of 1832 makes the decisions of the courts of Virginia the guide in adjusting these claims, and those courts have not allowed staff pay to officers whose staff duties ceased before the termination of the service; nor have they allowed interest.

JNO. D. McPHERSON,  
*Deputy Solicitor Court of Claims.*

ISAAC S. BOWMAN and GEORGE BRINKER, surviving executors of ISAAC BOWMAN, deceased, *vs.* THE UNITED STATES.

Judge BLACKFORD delivered the opinion of the Court.

This claim was presented to the Treasury Department in 1834, and was rejected by the Secretary, Mr. Woodbury, on the ground that the evidence was not deemed sufficient in the absence of all record proof of the testator's services. In March, 1853, the case was submitted to Mr. Heath, the Commissioner of Pensions, and the claim was rejected. In September, 1853, the case was submitted to Mr. Waldo, the Commissioner of Pensions, and the claim was again rejected. In October, 1853, the decision of Commissioner Waldo was affirmed by the Secretary of the Interior, Mr. McClelland. A petition was afterwards presented to Congress in favor of the claim. On the 13th of February, 1854, the Senate Committee on Pensions made a favorable report, submitting the following resolution: "Resolved, that the claim of Isaac Bowman, legal representative of Isaac Bowman, deceased, for half-pay due his father under the act of the general assembly of Virginia of May, 1779, be referred to the Secretary of the Interior for liquidation under the act of Congress of July 5, 1832, and that the Committee on Pensions be discharged from the further consideration of the case." That resolution was adopted by the Senate. On the 16th of February, 1854, the House Committee on Revolutionary Claims reported favorably, submitting the following resolution: "Resolved, that the petition in the case of Isaac Bowman be referred to the Secretary of the Interior for liquidation under the act of July 5, 1832, and that the committee be discharged from its further consideration." And, in the next month, the House committee reported as before, and the resolution last above named was passed by the House. In consequence of those resolutions, the claim was again presented to the Secretary of the Interior, Mr. McClelland. The claimant contended that the resolutions required the Secretary to allow the claim, and relied on the opinion of a former Attorney General, in 1849, in the case of Churchill Gibbs.—(5 Att. Gen., 82.) The Secretary referred the question, in 1854, to the Attorney General then in office, who gave his opinion that the resolutions had not the effect of a law, but that it would be proper for the Secretary to re-examine the merits of the claim, (6 Att. Gen., 680,) in which opinion the Secretary concurred. The Secretary accordingly re-examined the merits, evidently with great care, and, in September, 1854, gave a lengthened written opinion adverse to the claim.

The case is now submitted to the consideration of this Court.

With respect to the effect of the separate resolutions of the two Houses of Congress, referring this claim to the Secretary of the Interior, in 1854, the opinions of the then Attorney General and Secretary are, in our opinion, correct. Those resolutions did not direct the Secretary to allow the claim, and if they had, they would not have been obligatory upon him. They justified him in re-examining the case, and that was all.

The petition states that Isaac Bowman, the testator, was a lieutenant-

ant and quartermaster, also called horse master, in the Illinois regiment commanded by Colonel George Rogers Clark, in the war of the revolution; that whilst he, the testator, was in service in the line of his duty, and commanding a detachment of said regiment, the troops were attacked by the Indian allies of Great Britain, in which attack the testator was severely wounded and taken prisoner; that he was detained as a prisoner from November, 1779, till April, 1780, when he was sold by his captors to an Indian trader, by whom he was taken to New Orleans, and from there to Cuba, from whence, passing through Philadelphia, he returned to his home in Virginia; that he never resigned as lieutenant or quartermaster, otherwise called horse master; that he was never again ordered into service after his return from captivity; that he was never dismissed from the service; and that he died on the 9th of September, 1826. The petition therefore claims that the testator was entitled, under the laws of Virginia, to the half-pay of a lieutenant and quartermaster from the close of the revolutionary war until the time of his death; that the claimants, as his executors, are now entitled to receive the same from the United States, and that payment has been demanded at the proper department and refused.

This claim is founded on an act of the Virginia legislature of May, 1779, and an act of Congress of the 5th of July, 1832. The Virginia act is as follows: "All general officers of the army being citizens of this Commonwealth, and all field officers, captains and subalterns, commanding or who shall command in the battalions of this Commonwealth on continental establishment, or serving in the battalions raised for the immediate defence of this State, or for the defence of the United States, \* \* \* \* \* provided Congress do not make some tantamount provision for them, who shall serve henceforward, or from the time of their being commissioned, until the end of the war; and all such officers who have or shall become supernumerary on the reduction of any of the said battalions, and shall again enter into the said service if required so to do, in the same or any higher rank, and continue therein until the end of the war, shall be entitled to half-pay during life, to commence from the determination of their command or service."—(10 Hen. Stat., 25.)

The act of Congress above referred to, so far as it need be stated, is as follows:

The first section provides for the payment by the United States to the State of Virginia the amount which said State had paid to the officers commanding in the Virginia line in the war of the revolution, on account of half-pay for life promised said officers by that State.

The second section provides for the payment by the United States to the State of Virginia the amount of the judgments which had been rendered against her on account of the promise contained in her said act of 1779, in favor of the officers or representatives of officers of the regiments and corps (among others) "of Colonels Clark and Crockett, and Captain Rogers' troop of cavalry, who were employed in the Illinois service."

The third section (the one immediately applicable to this case) provides that the Secretary of the Treasury (now the Secretary of the Interior) adjust and settle those claims for half-pay of the officers of



said regiments and corps, which had not been paid or prosecuted to judgments against the State of Virginia, and for which said State would be bound on the principles of the half-pay cases decided in the supreme court of appeals of said State.—(4 Stat. at Large, 563.)

The claimants, therefore, to sustain the present suit against the United States for the half-pay in question, must show that the testator might, in his lifetime, have recovered said half-pay from Virginia on the principles of the half-pay cases which had been there decided previously to said act of Congress.

The principles of those half-pay cases in Virginia, referred to in said act of Congress, and upon which the case now before us depends, were fully discussed and settled in 1830, in the Virginia court of appeals, in Markham's case, 1 Leigh's Rep., 516 to 524, and Lilly's case, same volume, 525 to 565. Those principles are, that the officer for whose life the half-pay is claimed must have served in the revolutionary war and in the Virginia State line from the time said act of 1779 was passed, or from the time of his being commissioned, until the end of the war, or until he became a supernumerary.

The material evidence in the case is as follows :

A. A certificate by John Douthitt, clerk of the board of commissioners of the Illinois grant, dated the 29th of August, 1834. This certificate states that it appears from the books and papers in the office that Isaac Bowman served in said Illinois regiment as a lieutenant, and that he was allowed 2,156 acres of land in said Illinois grant, to wit, lots Nos. 1, 158, 213, 289—five hundred acres each, and 156 acres in No. 32.

B. An ex parte affidavit of Samuel Kerchival, dated the 8th of August, 1834. The affiant states that he became acquainted with Captain Isaac Bowman, of Shenandoah county, Virginia, about the year 1784, and continued afterwards intimately acquainted with him until his death, on the 9th of September, 1826; that said Bowman was known through life as an officer of the Illinois regiment of the army of the revolution; that he repeatedly stated to the affiant that, late in the fall of 1779, while coming from Kaskaskia (as affiant understood on furlough) to the Falls of Ohio, they (the party) were attacked by the Indians, when all but himself were killed, or never afterwards heard of; that he was wounded in five places, the scars of which the affiant had often seen, and was taken prisoner; that he was afterwards purchased by an Indian trader and taken to Natchez, from whence he went to New Orleans, and the Havana, on the island of Cuba, and then obtained a passage to Philadelphia, and returned to his home; that he was long a cripple, so unable to have joined his regiment or performed military duty, probably for a year or two, and that he said he lost his commission and papers when taken prisoner.

C. An ex parte affidavit of David Stickley, dated the 8th of August, 1834. The affiant says that he was intimately acquainted for about forty years with Captain Isaac Bowman, of said county, (Shenandoah, Virginia,) deceased; that said deceased, during that time, was

known and reputed to have been an officer in the Illinois regiment of the war of the revolution, and to have been wounded and taken prisoner by the Indians, and kept in captivity for some time; that affiant had often heard the history of the same from Captain Bowman himself, who said that, in ascending the Ohio river, he was attacked by the Indians, and (the party with him) nearly all killed; that he himself was wounded in several places, and taken prisoner, and retained some time in captivity, when he was purchased by an Indian trader and taken to Natchez, from whence he went to New Orleans and the island of Cuba; that having obtained a passage for Philadelphia, he returned to his residence, adjoining the affiant's, where the affiant believes said Bowman was born, and where he died about the 9th of September, 1824. From common report, and Captain Bowman's known character for truth, and his frequent recurrence to the said transactions, the affiant says he is as fully convinced of the reality of Bowman's service and captivity as he could possibly be of anything which he did not see.

D. An ex parte affidavit of Colonel Abraham Bowman, a revolutionary officer, dated the 23d of June, 1832. The affiant says that his brother, Isaac Bowman, a lieutenant in the Illinois regiment of the Virginia State line of the army of the revolution, was taken prisoner, as he has been informed by his said brother, and believes, on the Ohio river, about forty miles above the mouth, in November, 1779, being then, at the time of his capture, a lieutenant of said regiment, and having been in service from the spring of 1777; that he was with the Indians as a prisoner until April, 1780, and was then purchased by a man named Turnbull, and went to New Orleans, thence to Cuba, and thence to Philadelphia, which the affiant thinks was in the fall of 1781.

E. An ex parte affidavit of Colonel Anthony Crockett, of the army of the revolution, dated September 4, 1832. The affiant says that Isaac Bowman was a lieutenant of the Illinois regiment in the fall of 1779, at Vincennes; that the affiant, at that time, was returning into Virginia, and knows not how long Bowman continued in service.

F. A statement of George M. Bibb, saying that he was well acquainted with Anthony Crockett, who, by reputation and the public records, was an officer in Colonel George R. Clark's regiment, called the Illinois regiment; that he was a man of integrity, and entitled to full credit; that he, Bibb, also knew Colonel Bowman, who was a man of high character, and to whose statements full credit is due. And a statement of James Guthrie, saying that he knew said Crockett, and knows all that the Hon. George M. Bibb has said of him; and that he knew Colonel Bowman by character, which was unquestionably good.

G. An ex parte affidavit of Archibald Lovelace, dated 12th of April, 1852. The affiant says that he was acquainted with Daniel Orear, of Fauquier county, Virginia, who was a soldier in the Illinois regiment in the war of the revolution; that he heard Orear say, when speaking of his revolutionary services, that he was a part of his time under Lieutenant Isaac Bowman, of the Illinois regiment, who was a valuable officer,

and who, whilst serving as first lieutenant in said regiment, was taken prisoner on or near the Ohio river, and kept as such a considerable time; that Orear further said that Lieutenant Bowman lived and died in Shenandoah county, Virginia, leaving an honorable and intelligent family. The affiant says that Orear made said statement, in substance, more than once, and that he was a man of strict integrity, and is now dead, as the affiant is informed.

H. This paper contains a copy from the auditor's office of Virginia of an account against that State, presented by Isaac Bowman in June, 1783, as follows:

"1779, May 12. The State of Virginia, Dr. to Isaac Bowman.

"To my services as horse master in the Illinois regiment until I was defeated by the Indians, which was 17th day of November, and then until October the 11th, 1780, before I got home, which is sixteen months and twenty-nine days."

There is also from said office the following copy of a certificate as to the above account:

"24th June, 1783. I certify that Mr. Isaac Bowman was appointed horse master in the year 1779 in the Illinois department, but how long he continued I know not.

"G. R. CLARK."

The following, from said office, is a copy of the decision on said account, made by the Virginia commissioners for settling western claims:

"The commissioners are of opinion that Mr. Isaac Bowman ought to be allowed for his services as horse master, from the 12th of May, 1779, until the 17th of November, 200 days, at  $\frac{6}{4}$  per day, amounting to £63 6s. 8d.—equal to a quartermaster's pay. They are further of opinion that he was out of the service of this State at the time he was captured, and consequently has no legal claim for the time he remained in captivity, but beg leave to refer it to the consideration of the honorable the executive."

The said paper (H) also contains, from said office, copies of two receipts given to Isaac Bowman at Fort Clark in June, 1779: one by one Montrey for \$18, for taking up and securing three horses belonging to the State of Virginia; the other by one Piangraf for \$12, for four men taking care of the State horses six days.

I. Copies of other papers from said office, to wit: a letter to the governor of Virginia from John Todd, who was lieutenant of Illinois county, dated Richmond, 2d of June, 1780. The following is an extract from that letter: "Mr. Isaac Bowman, with seven or eight men and one family, set off from Kaskaskia the 15th of November last, in a bateau, attended by another bateau with twelve men and three or four families in it, bound to the Falls of Ohio. I judged it safer to send to the Falls many articles belonging to the Commonwealth by Bowman than to bring them myself by land. Bowman's bateau fell into the hands of the Chickasaw Indians, and the other arrived in

March or April at the French Lick on Cumberland, with the account that Bowman and all the men, except one Riddle, were killed and taken. I enclose your excellency a list of such articles as belonged to the State, as well as I can make them out from my detached memorandums, my books and many necessary papers being also lost."

An order for raising troops, headed "by George Rogers Clark, esq., colonel of the Illinois battalion, commander-in-chief of the Virginia forces in the western department, &c., &c., &c.," dated headquarters, Falls of Ohio, 30th of September, 1779.

"A provision return of the troops at Fort Clark, under the command of Colonel George Rogers Clark, commencing the 10th and ending the 12th of May, both days included, 1779," signed "James Robertson, quartermaster; G. R. Clark."

"An account of public horses purchased and delivered in the western and Illinois department under the direction of William Shannon, quartermaster general, &c." Among other entries in this account is the following: "1779, June 14. Delivered to Captain Bowman, horse master, as per receipt, 38 horses."

"FORT PATRICK HENRY, *July 10, 1779.*

"SIR: Please to deliver to Isaac Bowman all the goods remaining of the plunder taken at this post, with an inventory of the same; and your compliance will oblige your humble servant,

"JOS. BOWMAN.

"The QUARTERMASTER."

"Inventory of sundry stores delivered to Isaac Bowman by order of the major at Fort Patrick Henry, July 10, 1779." Here follows various items, such as blankets, &c.

K. Extracts from a small book in said office, on the first page of which book is written "plunder store account; Mr. Isaac Bowman, quartermaster, accounts." Copies of accounts in said book against several persons are given, one of which is as follows:

"Dr. Isaac.

Cr. Bowman.

"May 21. To 8 yards of," &c. The aforesaid auditor states that the upper corners of the greater part of said book is illegible, but when legible, it is invariably headed 1779. He also states "that so far as it had been practicable to search the mass of papers connected with the Illinois expedition, no evidence of a resignation by Isaac Bowman had been discovered."

L. A certificate, as follows:

"This is to certify that there is on file in this office, in the second volume of Illinois papers, an account headed thus: 'An account of quartermaster's stores, &c., issued in the Illinois and its dependencies, commencing the 1st day of June, 1779, by John Reid, quartermaster of the Illinois regiment, viz:' which is very lengthy; the first entry therein dated June 1, 1779, and the last on October 11, 1779, and is dated Falls of Ohio, October 31, 1779, and signed John Reid,



quartermaster Illinois regiment, and verified by G. R. Clark, November 4, 1779.

Given under my hand, in the office of the auditor of public accounts, Richmond, Virginia, this 15th of March, 1853.

RO. JOHNSTON,  
*Auditor of Public Accounts.*"

M. A letter from the secretary of State of Virginia, dated Richmond, May 19, 1853. He states that he could not find any record that commissions did issue or not to the officers on the Illinois frontier, designating the names of those officers; but that instructions were given to Colonel Clark to take the command of five other companies raised under the act of assembly, which, if completed, would have orders to join him, and to the lieutenant colonel, with blank commissions for the officers of five companies to be filled up, &c., and that those instructions, as well as those to John Todd, who was appointed county lieutenant or commandant of the county of Illinois, are stated on the journal of the 12th of December, 1778, to have been issued by the governor.

N. Copy of the proceedings of the commissioners for adjusting the claims of the officers and soldiers of the Illinois regiment to the lands given them under a resolution of the general assembly of Virginia, of January 2, 1781, agreeable to an act of assembly of that State, passed October session, 1783.

The board met at Louisville on the 2d of August, 1784, Colonel Clark being one of the members present; and on the next day the following resolution was adopted:

"That all officers and soldiers who marched and continued in service till the reduction of the British posts on the northwest side of the Ohio; that all who engaged and enlisted in the Illinois regiment afterwards, and served during the war, or three years, are entitled to a share of the grant under the resolution and act of assembly; that all those soldiers who have enlisted in said regiment since the second day of January for three years, or during the war, are not entitled, as there seems to be no provision made under the resolution for those who should thereafter be incorporated in the said regiment; that the officers of the regiment are entitled to a share of the land in proportion to the commission they respectively held on the 2d day of January, 1781, and not in proportion to the commission they have since held in consequence of promotions, and that, therefore, officers commissioned since that period are not entitled at all; and that those soldiers who enlisted to serve twelve months after their arrival at Kaskaskias, agreeable to an act of assembly of the fall session, 1778, for the protection and defence of the Illinois county, who did not re-enlist in the regiment, are not included in said resolution; that those officers who were commissioned under said act, and resigned before the expiration of the twelve months, are not entitled; last, that those who continued during the year, and then retired, not having a command, are entitled."



The board met on the fourth of August. The same members were present as on the third.

The claims of many persons were presented, and the most of them were allowed. The name "Isaac Bowman, lieutenant," is on the list of the applicants whose claims were allowed. By an order of the board, a subaltern officer was entitled to two thousand acres of land. The board met on the 8th April, 1788, Colonel Clark being one of the members present, when a deed was executed to Isaac Bowman for his four surveys of five hundred acres each.

O. Extracts from a journal of the Western Commission, which journal is on file in the auditor's office at Richmond, Virginia, as follows: January 1, 1783. "The papers of Major Joseph Bowman, deceased, and Captain Isaac Bowman, were laid before the board, which were examined, and finding them necessary for the settlement of other accounts, take them with them to the Falls of Ohio." March 22, 1783. "An account of Captain Isaac Ruddle was laid before the board for his company and rations when the Illinois country was taken by Colonel Clark. The money has been drawn by Colonel Montgomery at the treasury, and carried by him to Kaskaskias, from whence he sent it by Isaac Bowman on from thence to be delivered to Isaac Ruddle; and on the passage, Isaac Bowman being taken by Indians, and his papers destroyed, yet saved the money, and after he was at liberty gave it to Mr. Pollock; for this reason, and as part of it seems to be a private account, the commissioners could not settle it." These extracts also show an allowance by the commissioners on the 25th June, 1783, of Mr. Isaac Bowman's account of his services as horse master to the Illinois regiment as noticed in the aforesaid paper marked H. They also refer to Romney and Winchester pay rolls, noticed in the next paper.

P. Extracts from a book in said auditor's office, endorsed "Romney & Winchester's Copy Pay Rolls," showing that Isaac Bowman was an ensign, in 1775, in Captain Joseph Bowman's company of Virginia militia.

The foregoing is, in substance, the evidence on which the claimants rely.

The first question is, was the testator a lieutenant or quartermaster at any time in the Virginia troops under Colonel Clark in the revolutionary war?

It is certainly not proved that he was a quartermaster. The meaning of the paper marked K is too obscure to have any weight; whilst the papers marked I and L contain evidence against the idea of his being such officer. Indeed, his account, in paper marked H, against the State, presented by himself in 1783, was for his services as horse master (not quartermaster) in the Illinois regiment; and for part of the time charged he was paid six shillings and four pence per day, "equal to a quartermaster's pay." He was, no doubt, as Colonel Clark certifies, a horse master for a while in 1779 in the Illinois department, but such an employment, and a per diem payment for the service, are no evidence whatever that he was a quartermaster.

It may be considered, from the evidence, that the testator was a

lieutenant in the troops under Colonel Clark, in the summer of 1778. The general assembly of Virginia, on the 2d of January, 1781, resolved: "As Colonel George Rogers Clark planned and executed the secret expedition by which the British posts were reduced, and was promised, if the enterprise succeeded, a liberal gratuity in lands in that country for the officers and soldiers who first marched thither with him, that a quantity of land, not exceeding 150,000 acres, be allowed and granted to the said officers and soldiers, and the other officers and soldiers that have been since incorporated into the said regiment, to be laid off," &c.—(10 Hen. Stat., 565.) In 1783 a board of commissioners was appointed to settle and determine the claims to land under said resolution.—(11 Hen. Stat., 335.) That board, at its session at Louisville in 1784, recognized the testator as a lieutenant, and allowed him a lieutenant's share in said grant of land. It seems proper, therefore, that we should view him as such officer for the time required to entitle him to such share in the grant. The same board, at its session in August, 1784, stated, in accordance with said resolution of 1781, that all officers and soldiers who marched and continued in service till the reduction of the British posts aforesaid were entitled to a share of the grant. The said allowance of the commissioners, therefore, goes no further than to show that the testator was a lieutenant in said service until the reduction of those posts. Nor is there any other evidence, in our opinion, sufficient to show that he was such officer, at a subsequent period, in the Illinois regiment. The certificate of Douthitt amounts to no more than what is shown by the action of said board of commissioners at Louisville; and the ex parte affidavits of Kerchival, Stickley, and Lovelace are only as to rumors and matters of hearsay. The ex parte affidavits of Colonels Bowman and Crockett of the testator's being a lieutenant in said regiment in the fall of 1779, are insufficient, when viewed in connexion with the other evidence in the case, to establish the fact to which they relate. They are only parol evidence, and are liable to the objections to which, in such cases, such evidence is subject. They were made more than fifty years after the time they allude to, and do not state in what manner the affiants' knowledge was obtained.

The next question is, whether the testator's being a lieutenant in said troops when they captured the western posts, shows him to have been a lieutenant in the Illinois regiment referred to in the aforesaid act of Congress of 1832? And we think that it does not. The officers thus alluded to by said act of Congress were of the class of those to whom Virginia had conditionally promised half-pay by the aforesaid act of 1779; but that Virginia act only applies to officers of the regular line who were in service when that act passed, or were commissioned afterwards. The troops which marched against the western posts were not of the regular line. They were militia, raised by the mere order of the governor of Virginia, without legislative authority, and for a temporary purpose. Their term of service expired when the posts were reduced. The times of the reduction were as follows: Kaskaskias on the 4th of July, 1778; Cahokia a day or two afterwards. The inhabitants of St. Vincent's took the oath of allegiance to Vir-

ginia about the middle of July, 1778, through the influence of Mr. Gibault, under the instructions of Colonel Clark; and about the middle of August following Captain Helm, by order of Colonel Clark, took command at that place. So that said posts were reduced about nine months before the passage of the Virginia act of 1779. On the 15th of December, 1778, Mr. Hamilton, a British governor from Detroit, retook St. Vincent's, but Colonel Clark, with one hundred and seventy men, raised at or near Kaskaskias without authority, (the term of the Virginia militia having expired,) marched from Kaskaskias and captured St. Vincent's on the 24th of February, 1779, which was between two and three months before said act of 1779 was passed.—(Clark's Journal, in Dillon's History of Indiana, 1 vol., 132 to 173.) Indeed, the said Illinois regiment was not in existence when the western posts were reduced as aforesaid. It was raised afterwards, by an act of the Virginia legislature, for the avowed purpose of protecting the inhabitants of the country in which those previously conquered posts were situated. This appears by the following extract, under date of November, 1778, from Marshall's Life of Washington: "While the frontiers of New York and Pennsylvania were thus suffering the calamities incident to savage warfare, a fate equally severe seems to have been destined for Virginia. The western militia of that State had made some successful incursions into the country northwest of the Ohio, and had taken some British posts on the Mississippi. These, by an act of the legislature, were erected into a county called the county of Illinois, and a regiment of infantry, with a troop of cavalry, to be commanded by Colonel George Rogers Clark, \* \* \* were ordered to be recruited for its protection. This corps was divided into several detachments, the principal of which remained with Colonel Clark at Kaskaskias."—(3 Marshall's Life of Washington, 565.) That regiment continued in service until the end of the war. It is plain, therefore, that we cannot infer that the testator was an officer in the Illinois regiment referred to in said act of Congress, merely because he was an officer in the militia force that conquered the western posts. That the force that made those conquests was composed of militia is expressly stated in the preamble to the Virginia act for establishing the county of Illinois.—(9 Hen. Stat., 552.)

The last question is, even supposing the testator to have been a lieutenant or quartermaster in said regiment when said act of 1779 passed, did he serve till the end of the war or become a supernumerary?

We think it is quite certain that the testator did not serve until the end of the war. After his release from captivity, instead of going to his regiment, he went home in October, 1780, and there, so far as we are informed, he remained till the war ended. If, after his release, he joined the regiment and continued in service whilst the war continued, the burden of proof of those facts was on the claimants; but they have furnished no such proof. Besides, the testator's name not being on the list of those entitled to half-pay, as reported by the board of officers hereinafter particularly noticed, is very strong evidence that he did not serve till the end of the war.

With respect to his becoming a supernumerary, the facts are as follows: On the fifteenth of November, 1779, he, with seven or eight men and one family, set off from Kaskaskias in a bateau for the Falls of Ohio. On the seventeenth of the same month they were attacked on the Ohio river by the Indians, when the testator was severely wounded and taken prisoner. He was afterwards purchased from the Indians by a trader, and got to his home as aforesaid. That is the last we hear of him until in June, 1783, when he presented his account against the State of Virginia for services as horse master in the Illinois regiment, from the twelfth of May, 1779, till his defeat by the Indians on the seventeenth of November, and then till the eleventh of October, 1780, before he got home. There is nothing in those facts to show that the testator was a supernumerary officer. The Virginia act of 1779, in speaking of the officers entitled to half-pay; says: "And all such officers who have or shall become supernumerary, on the reduction of any of the said battalions, and shall again enter into the said service if required so to do," &c. If the testator, therefore, became such supernumerary officer, it was because the number of privates in said regiment had been so reduced as to occasion a surplus of officers, and he had been dismissed from active service by the proper authority as such an officer. In the Virginia court of appeals one of the judges, in commenting on the statutory provision now before us, says: "What is a supernumerary? He is just as much an officer as any other; but his battalion or corps has been reduced or disbanded, or so arranged in some way as to leave him for the present no command, and the State, to save the expense of full pay and subsistence, discharges him from actual service."—(Lilly's case, 1 Leigh's Rep., 529.) Now, nothing can be clearer than that the testator was not within this definition of a supernumerary officer. About the time of his release by the Indians and his return home, Virginia had great cause for increasing her military force on her western frontier, and was making great exertions to do so. In October, 1780, (the month in which the testator got home,) the legislature passed the following act: "And for defence of the western frontier against the invasions of the Indian or British enemy, Be it enacted, that the governor, with advice of council, shall have full and ample power to cause to be recruited and fully completed, upon the best terms possible, the regiment under Colonel George Rogers Clark's command, and that they be allowed the same pay and rations with other officers and privates on continental establishment, and be ordered into service whenever the governor, with advice of council, shall think proper." (10 Hen. Stat., 389.) This regiment, therefore, was not then to be reduced, but, on the contrary, it was to be recruited and fully completed upon the best terms possible. There is no evidence that there were too many officers in the regiment, and that the testator was dismissed from active service as a supernumerary officer. Nor does it appear from any source, not even from his own narratives of the affair to Kerchival or Stickney, that he at any time after his release from captivity joined the regiment or offered to do so, or even gave notice of his release. The suit must therefore fail for the reason,



were there no other, that it is not proved that the testator served to the end of the war or became a supernumerary.

The following facts connected with the cause tend strongly to show that there is no foundation for this claim:

1. The revolutionary war ended in 1783, and in 1784 the half-pay for the first year became due for those entitled to it, and the same continued to fall due at the end of each subsequent year during the officer's life. Now, the testator resided in Virginia in 1784, and continued to reside there for more than forty years afterwards, yet he does not appear to have ever claimed any such payments. That he was ready to claim anything from the State to which he supposed himself entitled is evident from his claim, before noticed, for his services as horse master, which he made at Richmond in 1783.

2. If he was entitled to half-pay, he was also entitled, under a general law of Virginia, to bounty land, to wit, to 2,000 acres; which quantity was afterwards considerably increased.—(10 Hen. Stat., 160, 375.) Yet there is no evidence that the testator ever received or applied for the bounty provided for by those statutes.

3. The testator's name is not found on any of the muster or pay rolls extant of the Illinois regiment. The Commissioner of Pensions, Mr. J. E. Heath, in a letter of the seventeenth of March, 1853, says: "There are on file in this office copies procured from Virginia of various muster and pay rolls, and other records of the service of officers of the Illinois regiment, but nowhere does the name of Isaac Bowman, as lieutenant, appear. This circumstance, coupled with the fact that quite as many officers have received half-pay for service in that regiment as ever belonged to it, raises at least a reasonable presumption against the present claim." Mr. J. F. Adams, an examiner in the Pension Office, in a communication of the ninth of August, 1853, to the Commissioner, says: "I have carefully read over all the rolls of the Illinois regiment as it was before November, 1779; Bowman's name does not occur on any pay roll or muster roll of *that period, when, it is said, he was a lieutenant*. I only find it in one list; it is that of the adjusting board of 1784."

That list of the adjusting board of 1784 is a list of those who claimed shares in the special grant of 150,000 acres of land, and does not, as before shown, affect this case.

4. In November, 1781, the Virginia legislature passed an act as follows: "And whereas, by the reduction of the battalions and corps in the State service, a considerable number of officers have become supernumerary, Be it enacted, that a return of all the State officers shall be made to the next assembly, wherein the corps, the rank of each officer, the date of his commission, the number of men at first raised in each corps, number of men when reduced, and time when reduced, shall be particularly specified by the executive; and the executive are hereby empowered and required to set on foot proper inquiries to discriminate such officers as by unworthy conduct, or by any means whatever, be thought unfit to be considered as entitled to half-pay."—(10 Hen. Stat., 466.) Afterwards a list of officers, as required by said act, was made out by a board of officers who sat at



Richmond in February, 1782; which list purports to contain the names of the officers of the Illinois regiment entitled to half-pay. That list, though not the exclusive test as to the officers entitled, is very high authority. It is spoken of by a judge of the Virginia court of appeals, as follows: "In consequence of this law, [said act of 1781,] a board was formed who reported to the executive a list of the officers as entitled to half-pay, and the executive approved of it, and sent it to the auditors for their guide in issuing warrants." (Lilly's case, 1 Leigh's Rep., 534.) We have examined that list, which is now before us, and find that Isaac Bowman's name is not on it.—(See list in Report No. 191, House of Rep., 22d Congress, 1st session.

We here close the examination of this case. Our opinion is, that Isaac Bowman, the testator, never had any right against the State of Virginia for the half-pay described in the petition; and that the present claimants, as his executors, have not now any right to such half-pay against the United States.



